Supreme Court, U.S.
FILED
APR 27 1979
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-1638

H. LYNN WOMACK,
Appellant

v.

CITY OF NORFOLK,
Appellee

On Appeal from the Supreme Court of Virginia

JURISDICTIONAL STATEMENT

ROGER E. ZUCKERMAN
ROGER C. SPAEDER
WILLIAM W. TAYLOR, III
ZUCKERMAN, SPAEDER & TAYLOR
1800 M Street, N.W.
Suite 375 North
Washington, D.C. 20036
Telephone: 202/223-8606

Counsel for Appellant

April 27, 1979

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

TABLE OF CONTENTS

	Page
DECISION BELOW	1
JURISDICTION	3
QUESTIONS PRESENTED	3
STATUTORY PROVISIONS INVOLVED	3
STATEMENT OF THE CASE	5
Introduction	5
Trial Proceedings	6
SECTION 31-101 OF THE CODE OF THE CITY OF NORFOLK IS INSUFFICIENTLY DEFINITE AND VOID FOR VAGUENESS AND IS AN EFFORT TO REGULATE SPEECH THAT VIOLATES THE GUARANTEE OF DUE PROCESS OF LAW OF THE FIFTH AND FOURTEENTH AMENDMENTS	10
A. The Constitutional Requirement of Definiteness	10
B. The Vagueness of Section 31-101	14
SECTION 31-101 OF THE CODE OF THE CITY OF NORFOLK IS OVERLY BROAD IN ITS REGULATION OF SPEECH AND PROHIBITS BOTH PROTECTED AND UNPROTECTED SPEECH. ACCORDINGLY, IT IS UNCONSTITUTIONAL AND IN VIOLATION OF THE GUARANTEE OF FREEDOM OF SPEECH CONTAINED WITHIN THE FIRST AND FOURTEENTH AMENDMENTS	18
A. The Constitutional Requirement of a Narrowly Drawn Statute	18
B. The Overbreadth of Section 31-101	20
CONCLUSION	23

TABLE OF CASES

Page

Adams v. *Hinkle*, 51 Wash.2d 763, 322 P.2d 844 (1958) 19
Bouie v. *Columbia*, 378 U.S. 347 (1964) 10, 11, 14
Joseph Burstyn, Inc. v. *Wilson*, 343 U.S. 495 (1952) 13, 14, 16, 18
Butler v. *Michigan*, 352 U.S. 380 (1957) 18, 19
Delta Book Distributors, Inc. v. *Cronvich*, 304 F. Supp. 662 (E.D. La. 1969), *modified on other grounds sub nom. Peres* v. *Ledesma*, 401 U.S. 82 (1971) 19
Dunn v. *Maryland State Board of Censors*, 240 Md. 249, 213 A.2d 751 (1965) 19
Entertainment Ventures, Inc. v. *Brewer*, 306 F. Supp. 802 (M.D. Ala. 1969) 19
Erznoznik v. *City of Jacksonville*, 422 U.S. 205 (1975) 20, 21, 22, 23
Ginsberg v. *New York*, 390 U.S. 629 (1968) 13, 14
Gooding v. *Wilson*, 405 U.S. 518 (1972) 23
Hayse v. *Van Hommissen*, 321 F. Supp. 642 (D. Ore. 1970), *vacated*, 403 U.S. 927 (1971) 19
Interstate Circuit, Inc. v. *City of Dallas*, 390 U.S. 676 (1968) 13, 14
Kingsley International Pictures Corp. v. *Regents*, 360 U.S. 684 (1959) 19
Lanzetta v. *New Jersey*, 306 U.S. 451 (1939) 10
Miller v. *California*, 413 U.S. 15 (1973) 10, 11
Miller v. *United States*, 430 U.S. 188 (1977) 11, 14, 22
Royal v. *Superior Court of N.H. Rockingham County*, 531 F.2d 1084 (1st Cir. 1976) 11
Stein v. *Batchelor*, 300 F. Supp. 602 (N.D. Tex. 1969), *vacated on other grounds sub nom. Dyson* v. *Stein*, 401 U.S. 200 (1971) 19
Winters v. *New York*, 333 U.S. 507 (1948) 12, 13, 14, 18
United States v. *B&H Dist. Corp.*, 319 F. Supp. 1231 (W.D. Wis. 1970), *vacated and remanded*, 402 U.S. 351 (1971), *after remand*, 347 F. Supp. 905 (1972), *vacated*, 413 U.S. 909 (1973), *after remand*, 347 F. Supp. 136 (1974) 19

TABLE OF CASES—Continued

Page

United States v. *Gavrilovic*, 551 F.2d 1099 (8th Cir. 1977) 11
United States v. *Harriss*, 347 U.S. 612 (1954) 10, 11
United States v. *Orito*, 338 F. Supp. 308 (E.D. Wis. 1970), *vacated and remanded*, 413 U.S. 139 (1973) 19
United States v. *Potts*, 528 F.2d 883 (9th Cir. 1975) 11

STATUTES

28 U.S.C. § 1257(2) 3
Section 31-101 of the Code of the City of Norfolk ..... *passim*

OTHER REFERENCES

The First Amendment Overbreadth Doctrine, 83 Harv. L. Rev. 844 (1970) 18

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No.

H. LYNN WOMACK,

Appellant

v.

CITY OF NORFOLK,

Appellee

On Appeal from the Supreme Court of Virginia

JURISDICTIONAL STATEMENT

Appellant H. Lynn Womack respectfully appeals from the final judgment of the Supreme Court of Virginia affirming his conviction and holding that Section 31-101 of the Code of the City of Norfolk, which regulates the display of certain sexually-oriented, adult literature, is not violative of the First and Fifth Amendments of the Constitution of the United States.

DECISION BELOW

The judgment of the Supreme Court of Virginia, entered November 14, 1978, without opinion, appears in the appendix hereto.

This appeal was due 90 days thereafter, on February 12, 1979. Appellant was unable to file his appeal on that date, as described below. Appellant was also unable to secure the normal extension of time pursuant to Rule 34 of the Rules of the Supreme Court of the United States. Appellant was incarcerated at the Federal Correctional Institute at Lexington, Kentucky upon unrelated charges from November 1978 through March 1979. His location at an institution approximately 550 miles from his home made it difficult for him effectively to prepare matters relating to the filing of this appeal. Moreover, during the period of his confinement, appellant suffered from several debilitating diseases, including diabetes, hypertension and severe vision handicaps. (Appellant is legally blind.) These as well made difficult appellant's ability properly to order his legal affairs. Finally, appellant encountered difficulties obtaining new counsel and was unable to meet with present counsel and formally retain him until February 14, 1979, two days after the appeal (or motion for extension) was due. Appellant's former counsel filed no motion for extension of time on appellant's behalf.

Upon his retention in mid-February, new counsel expeditiously pursued preparation of this appeal. That task was delayed by appellant's incarcerative status and by difficulty in obtaining the transcript of the trial proceedings and other relevant documents from former counsel. Through no fault of appellant's, these items were not made available to appellant and his new counsel until March 27, 1979.

It is for these reasons that appellant files this appeal after the expiration of the normal 90-day filing period.*

---

* A Notice of Appeal has been filed by appellant and accepted by the Circuit Court of the City of Norfolk, the court possessed of the record, and the Supreme Court of Virginia. A copy appears in the appendix.

JURISDICTION

This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1257(2).

QUESTIONS PRESENTED

The Supreme Court of Virginia has held constitutional Section 31-101 of the Code of the City of Norfolk, a local ordinance purporting to restrict in a permissible fashion the display of certain adult, sexually-oriented publications. The questions presented are:

1. Where Section 31-101 of the Code of the City of Norfolk fails reasonably and precisely to define the concepts "sexually explicit nudity" and "harmful to juveniles," is the ordinance void under the Fifth and Fourteenth Amendments as unconstitutionally vague?

2. Where Section 31-101 of the Code of the City of Norfolk broadly defines the concepts "sexually explicit nudity" and "harmful to juveniles" so as to capture within their meaning constitutionally protected and non-obscene speech, is the ordinance void under the First and Fourteenth Amendments as unconstitutionally overbroad?

STATUTORY PROVISIONS INVOLVED

Section 31-101(1) of the Code of the City of Norfolk provides:

> Sec. 31-101. Sale, loan, exhibition, etc., of certain materials to juveniles.
>
> (1) Definitions. As used in this section:
>
> (a) "Juvenile" means a person less than eighteen years of age.
>
> (b) "Sexually explicit nudity" means a state of undress so as to expose the human male or female genitals, pubic area or buttocks with

less than a full opaque covering, or the showing of the female breast with less than a fully opaque covering of any portion thereof below the top of the nipple, or the depiction of covered or uncovered male genitals in a discernibly turgid state.

(c) "Sexual conduct" means actual or explicitly simulated acts of masturbation, homosexuality, sexual intercourse, or physical contact in an act of apparent sexual stimulation or gratification with a person's clothed or unclothed genitals, pubic area, buttocks or, if such be female, breast.

(d) "Sexual excitement" means the condition of human male or female genitals when in a state of sexual stimulation or arousal.

(e) "Sadomasochistic abuse" means actual or explicitly simulated flagellation or torture by or upon a person who is nude or clad in undergarments, a mask or bizarre costume, or the condition of being fettered, bound or otherwise physically restrained on the part of one so clothed.

(f) "Harmful to juveniles" means that quality of any description or representation, in whatever form, of nudity, sexual conduct, sexual excitement, or sadomasochistic abuse, when it (i) predominantly appeals to the prurient, shameful or morbid interest of juveniles, (ii) is patently offensive to prevailing standards in the adult community as a whole with respect to what is suitable material for juveniles, and (iii) is, when taken as a whole, lacking in serious literary, artistic, political or scientific value for juveniles.

(f) "Knowingly" means having general knowledge of, or reason to know, or a belief or ground for belief which warrants further inspection or

inquiry of both (i) the character and content of any material described herein which is reasonably susceptible of examination by the defendant, and (ii) the age of the juvenile; provided, however, that an honest mistake shall constitute an excuse from liability hereunder if the defendant made a reasonable bona fide attempt to ascertain the true age of such juvenile. . . .

Section 31-101(2)(e)(i) provides:

. . . (e) It shall be unlawful for any person knowingly to exhibit, expose or display in public at newsstands or any other business or commercial establishment frequented by juveniles or where juveniles are or may be invited as part of the general public.

(i) Any picture photograph, drawing, sculpture, motion film, or similar visual representation or image of a person or portion of the human body which depicts sexually explicit nudity, sexual conduct or sadomasochistic abuse and which is harmful to juveniles, or . . .

STATEMENT OF THE CASE

Introduction

By indictment filed February 1, 1978, appellant was charged in a single count with unlawfully displaying a sexually explicit magazine at his bookstore, Budget Books, 2328 East Little Creek Road, a business where juveniles, among others, may enter as part of the general public. The unlawful display of the magazine, entitled "Male Swinger", was alleged to have occurred on January 5, 1978. Appellant's display of the magazine was said to have violated Section 31-101 of the Code of the City of Norfolk, Virginia, 1958, as amended, a Norfolk city ordinance purporting to regulate the manner by which sexually explicit items may be displayed on various business premises.

On April 10 and 11, 1978, appellant was tried before Circuit Court Judge Alfred W. Whitehurst and a jury. Appellant was found guilty of unlawful display of the magazine and was fined $1,000. Appellant thereafter noted an appeal to the Supreme Court of Virginia. On November 14, 1978, that court affirmed appellant's conviction and dismissed his petition for appeal.

Trial Proceedings

The City's case against appellant was based upon an incident occurring on January 5, 1978, at appellant's bookstore. That bookstore, Budget Books, is a large commercial establishment with thousands of volumes of books and magazines available for sale. The range of topics is considerable and in January 1978, the bookstore was frequented by all segments of the purchasing public.

Among the items sold at Budget Books were a series of sexually-oriented adult magazines. These magazines were displayed in an area of limited access, adjacent to the front counter, an area under the control and supervision of the store manager. Efforts were made to mask the covers of the magazines with an opaque plastic strip several inches wide: the strip substantially impeded the ability of any customer to view the covers of the adult magazines displayed in the limited access area. A sign was posted limiting access to the adult magazine area and limiting purchase of the magazines to those over the age of eighteen years.

Despite these precautions, about which there was little trial dispute, appellant was alleged by the City to have violated its display ordinance by the following events. On January 5, 1978, police investigator Stuart F. Auer entered appellant's bookstore and proceeded to the limited access area in which adult magazines were located. Investigator Auer testified that he was able to detect a portion of a male penis on the cover of a magazine entitled

"Male Swinger", the opaque barrier notwithstanding. The investigator further testified that a stack of "Male Swinger" magazines was also located on the floor at the foot of the opaque-covered display shelf. As to these magazines, no opaque covering existed and two nude males were visible. Auer purchased a copy of "Male Swinger" from the clerk. The display of its cover, as described above, constituted appellant's offense. Auer offered his opinion that the area in which he saw the magazines, its limited access notwithstanding, was within the view of the general buying public at Budget Books, including children.

The City completed its case with the testimony of Reverend Herbert U. Smith, Jr. Reverend Smith testified that the cover of "Male Swinger" was contrary to the contemporary community standard of the City of Norfolk as regards materials acceptable for juveniles.

Following completion of the City's case, appellant moved to strike the City's evidence and for judgment of acquittal on grounds that Norfolk Code Section 31-101 was unconstitutionally vague and overbroad. Appellant specifically objected to that section of the statute defining the phrase "(h)armful to juveniles" proscribing the display of mere "nudity"; to that portion of the definition of "(h)armful to juveniles" proscribing appeals to "shameful or morbid interest of juveniles" with no further limiting or defining language and specifically with no language relating such interest to sexual matters; and to the broad and presumptive definition of "(k)nowingly" contained within the statute. Appellant urged that these statutory provisions raised serious constitutional problems of vagueness and overbreadth. Judge Whitehurst denied appellant's motion to strike and his motion for judgment of acquittal.

Appellant then presented evidence that spoke to the actual circumstances of the display of the magazine

"Male Swinger". Photographer R. M. Blanton testified that he took photographs of the area set aside at Budget Books for the display of sexually-oriented magazines on January 6, 1978, the day after the Auer visit. The photographs depicted signs limiting access to the display area as well as broad opaque strips on the magazines displayed there. Mr. Blanton testified that to his eye, the opaque strips were absolutely effective as a barrier to display of the covers of the magazines in the adult section.

Neighbors living in the area of the large bookstore also spoke in its defense. Earl Ramey, who lived four or five blocks away, testified that he visited the store early in January of 1978. He recollected the opaque strips, the signs limiting access to adults, and a stanchion with a rope enforcing the signs as being present during this period. The photographs depicting these visual and physical impediments introduced through photographer Blanton were accurate in the opinion of Mr. Ramey.

Patrick Dudley Williams, a magazine distributor with a route that included Budget Books, also testified to these events and to a general condition of the store consistent with the photographs and with Mr. Ramey's description. Similar testimony was given by Virginia Fenton, a Norfolk resident who frequently took her two teenaged children to Budget Books.

Bernadine Sutton, a Deputy High Constable for the City of Norfolk, also testified for the defense that the red opaque strips were in operation and the access-limiting signs present for the previous several years.

Professor Joseph Hellinger, a resident of Norfolk and a professor of history for fourteen years at Norfolk State College, testified as to the highly restricted nature of the display section on or about January 5, 1979. He described the opaque coverings and the signs restricting juvenile

access. Professor Hellinger also testified that in his experience other commercial stores open to the public displayed sexually-oriented magazines far more obstrusively than Budget Books, without police interference.

And Retha Daniels, the store clerk who sold the magazine in question to Investigator Auer, herself described the interior of the store on January 5, 1978, and the display procedures followed. She testified to extensive efforts to mask sexually-oriented materials, to display signs limiting access to such material to adults, and to her own responsibilities to prevent juveniles from entering the restricted display area.

After the defense rested, the City presented as rebuttal evidence the unusual testimony of one Mary Louise Cherry, the prosecutor's girlfriend. It developed that the previous day, the prosecutor (Benjamin Bull) had asked Ms. Cherry to go with him to Budget Books. Although denying any social pretext for the visit, Ms. Cherry gave no other purpose for the engagement. After she and Mr. Bull entered Budget Books, Ms. Cherry noticed a stack of sexually explicit magazines on the floor by the counter. The magazines were not masked. Ms. Cherry testified that she had not expected to be a trial witness but had simply visited the trial out of curiosity.

On this bizarre note, the trial ended. Judge Whitehurst, over defense objection, then instructed the jury as to the elements of violation of Section 31-101 by tracking exactly the language of the pertinent portions of the statute. Specifically, the concepts of "harmful to juveniles" and "knowingly" were articulated to the jury precisely as Section 31-101 set them out.

The jury returned a verdict of guilty and fined appellant $1,000. Appellant's motions to set aside the verdict were denied and the trial court imposed judgment in the form of a $1,000 fine.

Appellant then took an unsuccessful appeal to the Supreme Court of Virginia, after which he brought this appeal.

SECTION 31-101 OF THE CODE OF THE CITY OF NORFOLK IS INSUFFICIENTLY DEFINITE AND VOID FOR VAGUENESS AND IS AN EFFORT TO REGULATE SPEECH THAT VIOLATES THE GUARANTEE OF DUE PROCESS OF LAW OF THE FIFTH AND FOURTEENTH AMENDMENTS.

Section 31-101 of the Code of the City of Norfolk is an unconstitutional regulation of speech. It is vague and indefinite in the proscriptions it attempts to enforce, vices that render it violative of basic and long-articulated due process guarantees. These defects we speak to below, beginning with a brief exposition of the constitutional requirement of statutory definiteness, both as a general imperative and as a particular requirement of state regulation of speech.

A. The Constitutional Requirement of Definiteness

There has long existed a due process right to fair warning of the precise conduct proscribed by criminal sanction.[1] It is a right to reasonable notice that is "fundamental to our concept of constitutional liberty."[2] In *United States* v. *Harriss*, 347 U.S. 612 (1954), in a formulation that has gained increasing currency, this Court described the right thusly:

> The constitutional requirement of definiteness is violated by a criminal statute that fails to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden by the statute. The underlying principle is that no man shall be held criminally responsible for conduct which he could not reasonably understand to be proscribed.

Id. at 617. This Court in *Bouie* v. *Columbia*, decided the same year as *Harriss*, was equally emphatic about the unforeseeable judicial extension of criminal statutes and the constitutional dilemmas that such interpretations created:

> [A]n unforeseeable judicial enlargement of a criminal statute, applied retroactively, operates precisely like an ex post facto law, such as Art. I, § 10, of the Constitution forbids . . . .

Bouie v. *Columbia*, *supra* at 353-354.

The right to reasonable notice and to be free of novel and unforeseeable judicial extensions of criminal statutes has been subject to continuing and categorical affirmation. In 1977, this Court, relying on *Bouie* and *Harriss*, overturned convictions under the obscenity statutes based on the retroactive application of the standards set forth in *Miller* v. *California*, 413 U.S. 15 (1973). *Marks* v. *United States*, 430 U.S. 188, 191 (1977). The Court agreed that the unforeseeable expansion of a criminal statute by broad judicial interpretation is unconstitutional and that criminal liability may not flow as a result. *Id.* at 196. Similar recent reliance on the rights of notice and foreseeability articulated in *Bouie* and *Harriss* may be found in reversals ordered by the Eighth Circuit in *United States* v. *Gavrilovic*, 551 F.2d 1099 (8th Cir. 1977) (no reasonable notice of proscription of dangerous drug by Drug Enforcement Administration prior to publication in Federal Register); by the First Circuit in *Royal* v. *Superior Court of N.H. Rockingham County*, 531 F.2d 1084 (1st Cir. 1976) (absence of reasonable notice in New Hampshire flag desecration statute); and by the Ninth Circuit in *United States* v. *Potts*, 528 F.2d 883

---

[1] *Bouie* v. *Columbia*, 378 U.S. 347 (1964).

[2] *Marks* v. *United States*, 430 U.S. 188, 191 (1977). See also *Lanzetta* v. *New Jersey*, 306 U.S. 451 (1939).

(9th Cir. 1975) (prospective application only of state statute allowing expunged conviction to be used as an essential element of subsequent crime).

The values that the constitutional requirement of definiteness serves are particularly important in areas regarding the regulation of speech. While the difference between permissible and proscribed *conduct* is reasonably articulable and understandable, the line between protected and proscribed *speech* is far more obtuse. The parameters of obscenity regulation are not easily captured in words. As a consequence, it is normally difficult for the bookseller, author, distributor or exhibitor to know with any reasonable certainty whether given material is proscribed. In addition, vague obscenity statutes cause people to err on the side of caution, neither distributing nor displaying materials that may indeed be protected by the First Amendment. This chilling effect on the expression of constitutionally protected ideas becomes the insidious by-product of vague obscenity regulation.

As a consequence of these dangers, this Court has been exceedingly rigorous in requiring obscenity statutes to meet high standards of specificity and precision. Beginning in *Winters* v. *New York*,[3] the Court noted that a criminal statute in the obscenity area must be more specific than a statute imposing civil sanctions and that impermissible vagueness may take any one of many forms.[4] It may be the absence of "ascertainable standards of guilt" in the offending regulation. It may be "uncertainty in regard to persons within the scope of the act". Or it may be uncertainty "in regard to the applicable tests to ascertain guilt." [5]

[3] 333 U.S. 507 (1948).

[4] *Id.* at 515-516.

[5] *Id.* In *Winters*, the Court of Appeals of New York had tried to limit New York's statute relating to descriptions of crime and violence to stories of violence or crime so "massed" as to "incite crime" or to become "vehicles for inciting violent and depraved crimes." *Id.* at 518. Even this, the Supreme Court held, was too vague. The concept of "massing stories to incite crime" had no "settled meaning and was therefore impermissibly vague." *Id.* at 518.

Four years after *Winters*, in *Joseph Burstyn, Inc.* v. *Wilson*, this Court struck down a New York statute precluding the showing of "sacriligious" motion pictures in part because of the vagueness of that concept.[6] The Court in *Burstyn* added yet an additional consequence to the vice of vagueness. A vague statute fails adequately to constrain the enforcing authorities. Thus, not only is a potential violator left without fair notice, but the state may engage in "boundless" regulation with no constraints save those "provided by the most vocal and powerful orthodoxies." [7]

In 1968, this Court rendered its most extensive treatment of the vagueness problem in the obscenity area. In *Interstate Circuit, Inc.* v. *City of Dallas*,[8] the Court confronted an effort by the City of Dallas to regulate motion pictures "suitable" for "young persons." [9] Despite a significant statutory description of that which was not "suitable for young persons" far more extensive than the one-word standards of *Winters* and *Burstyn*, the Supreme Court struck the Dallas ordinance down as unconstitutionally vague. On the same day *Interstate Circuit* was decided, this Court decided *Ginsberg* v. *New York*.[10] In *Ginsberg*, New York's attempt to regulate certain material that was "harmful to juveniles" was sustained

[6] 343 U.S. 495 (1952). The New York statute was also struck down on grounds that it created an impermissible classification based on religious doctrine.

[7] *Id.* at 504.

[8] 390 U.S. 676 (1968).

[9] *Id.* at 681-682.

[10] 390 U.S. 629 (1968).

against, among others, a challenge that it was unconstitutionally vague. Unlike the Dallas ordinance, the New York statute had been limited by state judicial definition to the proscription of material that was "virtually identical to the Supreme Court's most recent statement of the elements of obscenity." [11]

In consideration of *Ginsberg* and in consideration of the standards set forth five years later in *Miller* v. *California*,[12] it is apparent that a constitutionally definite statute must be precise, capable of understanding by persons of ordinary intelligence, noncontradictory, and limited in application to that which is legally obscene. Section 31-101 fails in each of these respects, as we describe below.

B. The Vagueness of Section 31-101

Section 31-101 of the Code of the City of Norfolk is an effort to regulate the manner by which certain commercial materials may be displayed to juveniles. The ordinance attaches substantial criminal sanctions to those displays which run counter to its terms, including [in subsection 31-101(3)] imprisonment for up to 12 months. The heart of the statute may be found in its definition of "sexually explicit nudity" [in subsection 31-101(1)(b)] and in its definition of "harmful to juveniles" [in subsection 31-101(1)(f)]. These two concepts form the predicate for conviction under subsection 31-101(2)(e), which proscribes the display of photographs of pictures which depict "sexually explicit nudity" and which are "harmful to juveniles". Both of these key predicate concepts are inadequately and improperly defined by Section 31-101 and are, within the meaning of *Winters*, *Burstyn*, *Interstate Circuit* and *Bouie*, unconstitutionally vague.[13]

[11] *Id.* at 643.

[12] 413 U.S. 15 (1973).

[13] *Id.* at 24.

1. *Subsection 31-101(1)(b): "Sexually explicit nudity"*. Subsection 31-101(1)(b) defines the predicate concept "sexually explicit nudity" as follows:

> (b) "Sexually explicit nudity" means a state of undress so as to expose the human male or female genitals, pubic area or buttocks with less than a full opaque covering, or the showing of the female breast with less than a fully opaque covering of any portion thereof below the top of the nipple, or the depiction of covered or uncovered male genitals in a discernibly turgid state.

It is a model of obscurity and contradiction. As to certain nude states, a mere "state of undress" is sufficient to implicate the ordinance's proscriptions. As to other nudity (this dealing principally with the female breast), the reader is advised that only a "showing" is proscribed. And as to nudity regarding male genetalia, the ordinance alters its discussion to "depictions." The subsection is simply unclear as to whether its definitions apply to actual human nudity, pictoral representations, or something in between.

Second, the subsection describes a "full opaque covering" required to remove the nude condition from that which is proscribed. The "full opaque covering", for some reason, is included as a cleansing factor for male genitals in lines three and four but curiously omitted as a cleansing factor in the description of proscribed depictions of male genitals in lines seven, eight and nine. The careful reader of the subsection is faced with virtual contradiction.

Third, the concept of "full opaque covering" is never defined, despite its critical importance. The heart of the ordinance is its requirement that a barrier be constructed between the viewer and the item to be viewed. The ordinance, however does not specify the location of the barrier or the effect of the opacity required. Must the

covering appear on the magazine itself? May it appear as a barrier in front of the magazine? Must the covering be a part of the picture? What impact must the opacity have on the viewer? How impeded must his vision be? Given the fact that the heart of the regulatory scheme is the required barrier, the statute is deficient in its articulation of the kind and degree of opacity it seeks to impose on booksellers and magazine distributors whose wares it covers.

The practical consequence of this vagueness may be seen quite graphically in appellant's trial. There was substantial testimony from defense witnesses about various barriers to entry that existed on or about the day of the allegedly unlawful display of the magazine "Male Swinger". Even Investigator Auer acknowledged the existence of an opaque barrier. The jury was presented the issue of whether the barrier was sufficient. Neither the statute nor the trial court's instructions, however, speak to that issue and the jury was left simply to speculate. More critically, this appellant, the owner and operator of a substantial bookstore, was left to speculate about the degree of opacity required to protect him from official sanction. And Investigator Auer was left to his own discretion to determine against whom to proceed, the very discretion this Court condemned in *Burstyn*.

2. *Subsection 31-101(1)(f), "Harmful to juveniles"*. Subsection 31-101(1)(f) defines the predicate concept "harmful to juveniles" as follows:

> (f) "Harmful to juveniles" means that quality of any description or representation, in whatever form, of nudity, sexual conduct, sexual excitement, or sadomasochistic abuse, when it (i) predominantly appeals to the prurient, shameful or morbid interest of juveniles, (ii) is patently offensive to prevailing standards in the adult community as a whole with respect to what is suitable material for juveniles, and (iii) is, when taken as a whole, lacking in serious literary, artistic, political or scientific value for juveniles.

The definition is deficient.

First, it presents to the reader, unhinged from any modifying language, the concept of "morbid interest." The "morbid interest" may be in airplanes, warfare, or cliff diving. The statute is simply vague in this regard. The normal requirement that "morbid interest" be prurient or be a "morbid interest in sexual matters" is simply excised from the subsection. While the error raises First Amendment problems of overbreadth, it also raises significant vagueness problems.

Second, the concept of that which appeals to the "shameful" is also left unlimited by the normal modifying ". . . interest in sexual matters." The kind of *shame* that tolls the ordinance's proscriptions is left vague.

Third, the subsection's definition jetisons the concept of "sexually explicit nudity" simply in favor of "nudity". The reason is not clear. But the effect is unfortunate. The entire effort at precision in the definition of "sexual explicit nudity" in subsection 31-101(1)(b), its failure notwithstanding, falls by the wayside in subsection 31-101(1)(f). In its place is the notion of "nudity", far broader and encompassing and far more vague. Does the subsection broaden the concept of "sexually explicit nudity" to apply to unclothed parts of the human body apart from genital areas defined in subsection 31-101(1)(b)? Does the concept of "nudity" include unclothed thighs or legs or stomachs? Does it include portions of the female breast above the nipple? Does it include depictions of "covered . . . male genitals" in a "nonturgid" state? The ordinance, of course, is silent because it is in contradiction. And in that contradiction, the ordinance displays yet another aspect of its unconstitutional vagueness.

SECTION 31-101 OF THE CODE OF THE CITY OF NORFOLK IS OVERLY BROAD IN ITS REGULATION OF SPEECH AND PROHIBITS BOTH PROTECTED AND UNPROTECTED SPEECH. ACCORDINGLY, IT IS UNCONSTITUTIONAL AND IN VIOLATION OF THE GUARANTEE OF FREEDOM OF SPEECH CONTAINED WITHIN THE FIRST AND FOURTEENTH AMENDMENTS.

Section 31-101 of the Code of the City of Norfolk is constitutionally defective for yet another reason. It punishes protected speech as well as legal obscenity. Its proscriptions are overly broad and catch within their wide net speech that may not be prosecuted, regulated, or otherwise proscribed. This overbreadth renders the entire ordinance unconstitutional as violative of appellant's First Amendment rights to freedom of speech.

A. The Constitutional Requirement of a Narrowly Drawn Statute

Courts have repeatedly expressed a First Amendment sensitivity to the breadth of application of statutes that purport to regulate speech. It is an axiom of First Amendment doctrine in this area that only that which is constitutionally obscene may come within a statute's proscriptions.[14] Thus, a statute may not constitutionally punish in the same manner as legal obscenity speech which cannot properly be held obscene.[15]

Perhaps the clearest articulation of the doctrine was given by this Court in *Butler* v. *Michigan*, 352 U.S. 380 (1957). In *Butler*, the defendant was convicted under a Michigan statute designed for the protection of minors, akin to Section 31-101 here. The Michigan statute made

[14] See generally, Note, *The First Amendment Overbreadth Doctrine*, 83 Harv. L. Rev. 844 (1970).

[15] *Winters* v. *New York*, 333 U.S. 507 (1948). See also *Joseph Burstyn, Inc.* v. *Wilson*, 343 U.S. 495 (1952).

it unlawful to distribute materials "tending to incite minors to violent or depraved or immoral acts, manifestly tending to the corruption of the morals of youth."[16] Materials of this type were unlawful, even when sold to an adult. Appellant Butler's conviction was based on the sale of such materials to an adult police officer. This Court unanimously reversed the conviction, holding that the statute, by prohibiting the sale to adults of materials that might be harmful to minors, had too broad a sweep. Moreover, the Court articulated the obligation of the Government when regulating First Amendment protected areas to use the least restrictive regulatory alternative, an alternative that represented the smallest encroachment on the rights involved.

Following *Butler*, the Court continued to strike down statutes overly broad in their application, statutes that chilled and at times froze completely the exercise of legitimate First Amendment rights. See, *e.g.*, *Kingsley International Pictures Corp.* v. *Regents*, 360 U.S. 684 (1959).[17] Overbreadth, and the First Amendment violations that it creates, remain a rigorous standard to which state efforts

[16] *Id.* at 381.

[17] See also these additional cases for statutes struck down by lower courts on overbreadth grounds. *Stein* v. *Batchelor*, 300 F. Supp. 602 (N.D. Tex. 1969), *vacated on other grounds sub nom. Dyson* v. *Stein*, 401 U.S. 200 (1971); *United States* v. *Orito*, 338 F. Supp. 308 (E.D. Wis. 1970), *vacated and remanded*, 413 U.S. 139 (1973); *United States* v. *B&H Dist. Corp.*, 319 F. Supp. 1231 (W.D. Wis. 1970), *vacated and remanded*, 402 U.S. 351 (1971), *after remand*, 347 F. Supp. 905 (1972), *vacated*, 413 U.S. 909 (1973), *after remand*, 375 F. Supp. 136 (1974); *Entertainment Ventures, Inc.* v. *Brewer*, 306 F. Supp. 802, 813-815 (M.D. Ala. 1969) (three-judge court); *Delta Book Distributors, Inc.* v. *Cronvich*, 304 F. Supp. 662, 669 (E.D. La. 1969) (three-judge court), *modified on other grounds sub nom. Perez* v. *Ledesma*, 401 U.S. 82 (1971); *Hayse* v. *Van Hommissen*, 321 F. Supp. 642 (D. Ore. 1970), *vacated*, 403 U.S. 927 (1971); *Dunn* v. *Maryland State Board of Censors*, 240 Md. 249, 213 A.2d 751 (1965); *Adams* v. *Hinkle*, 51 Wash.2d 763, 322 P.2d 844 (1958).

at obscenity regulations are repeatedly put. See, *e.g.*, *Erznoznik* v. *City of Jacksonville*, 422 U.S. 205 (1975).

B. The Overbreadth of Section 31-101

The overbreath of Section 31-101 is manifest, much of it apparent from the face of the statute and from our earlier discussion of the statute's vagueness. The definition in Section 31-101(1)(b) of "sexually explicit nudity" includes within its terms photographic depictions of *any* human genetalia. It is not restricted, as some display ordinances are, to post-pubescent persons nor is it restricted in any fashion to those displays that are overtly sexual in orientation and approach. Indeed, any uncovered buttocks or breast depicted by magazine cover is subject to the ordinance's proscriptions. New born children, war victims, great works of art or scenes from a culture in which nudity is more openly accepted are thus within the definitional limits of subsection 31-101 (1)(b). For this reason alone, the ordinance is constitutionally defective, in precisely the same manner that this Court voided a Jacksonville ordinance as unconstitutionally overbroad in *Erznoznik* v. *City of Jacksonville*, 422 U.S. 205 (1975).

In *Erznoznik*, the Court faced a city ordinance proscribing exhibition at drive-in theaters of any motion picture in which human breasts, buttocks or pubic areas were displayed. The City defended the ordinance as a protection of its underage population through its police powers. This Court disagreed in words that are equally appropriate here:

> [A]ssuming the ordinance is aimed at prohibiting youths from viewing the films, the restriction is broader than permissible. The ordinance is not directed against sexually explicit nudity nor is it otherwise limited. Rather, it sweepingly forbids display of all films containing any uncovered buttocks

> or breasts, irrespective of context or pervasiveness. Thus it would bar a film containing a picture of a baby's buttocks, the nude body of a war victim or scenes from a culture in which nudity is indigenous. The ordinance also might prohibit news reel scenes of the opening of an art exhibit as well as shots of bathers on a beach. Clearly, all nudity cannot be deemed obscene even as to minors . . . nor can such a broad restriction be justified by any other governmental interest pertaining to minors.

Id. at 312.

That, of course, is precisely what has happened here. The City of Norfolk has deemed *all nudity* obscene and subject to regulation by opaque barrier. The Norfolk ordinance makes no effort to conform to the requirements of *Erznoznik* nor to define "sexually explicit nudity" in such a way as to factor out the kinds of protected speech that the Supreme Court found erroneously included within the ambit of the Jacksonville statute. Indeed, what has occurred is simply that the City of Norfolk has borrowed wholesale the substance of the Jacksonville ordinance and has tried to save it by appending the phrase "sexually explicit nudity" to the definitional section describing nude states that are proscribed. The *substance* of that section, however, [subsection 31-101(1)(b)] proscribes *all nudity* to the very same degree as did the Jacksonville ordinance. For that reason, its overbreadth ought immediately to be apparent.

The extent to which all nudity is deemed obscene and the subject of regulation may also be found in subsection 31-101(1)(f), the section entitled "harmful to juveniles." That subsection, as we have earlier described omits entirely the phrase "sexually explicit nudity" and substitutes in its place simply "nudity" (in "whatever form").

Finally, as we have noted with regard to the vagueness problem, subsection 31-101(1)(f) commits yet another

vice. In setting forth appeal to prurient interest that "nudity" may have, it broadens the concept of prurience to include a "shameful or morbid interest." No phrase of limitation is given to the notion of "shameful or morbid interest" and the phrase ". . . in sexual matters" that normally follows is excised. The essence of the proscriptions of Section 31-101 is thus to render unlawful the display of *any* "shameful nudity." As *Erznoznik* makes plain, the breadth of that proscription is impermissible.

It is clear that states may regulate in some fashion the "exhibition of obscene material when the mode of dissimenation carries with it a significant danger of offending the sensibilities of unwilling recipients or of exposure to juveniles." [18] What the City of Norfolk has done is far different. First, by an extraordinary breadth of definition of the concept "sexually explicit nudity", it has endeavored to regulate that which is not obscene. Second, lest there be any doubt about this breadth, it has deliberately excised the phrase "sexually explicit" from its definition of that nudity which is subject to regulation in its key definition of what is "harmful to juveniles." And third, it has defined the "interest" to which the nudity must appeal in sufficiently broad terms so as to include that which is shameful or morbid but which may have no connection to sexual activity. Section 31-101 thus deviates significantly from *Miller* in a fashion that renders it dangerously overbroad in its scope.

First Amendment values are important values. Indeed, in many respects they are the paramount values in our constitutional system. For on those values is based the interchange of thoughts and ideas that is fundamental to a free and democratic existence. Any regulation that restrains the dissemination of thoughts and ideas, no matter what its justification, may not touch that which is con-

[18] *Miller* v. *California*, 413 U.S. 15 (1973).

stitutionally protected speech. And, as *Erznoznik* teaches, a statute that attempts to regulate the dissemination of pictures that may contain "shameful nudity" does precisely that. For this reason as well, Section 31-101 deserves to be held unconstitutional.[19]

CONCLUSION

For the reasons stated above, it is respectfully submitted that the judgment below must be reversed.

Respectfully submitted,

ROGER E. ZUCKERMAN
ROGER C. SPAEDER
WILLIAM W. TAYLOR, III
ZUCKERMAN, SPAEDER & TAYLOR
1800 M Street, N.W.
Suite 375 North
Washington, D.C. 20036
Telephone: 202/223-8606

Counsel for Appellant

[19] We close by noting that the impact of this display ordinance on this appellant is particularly severe, since he operates a bookstore that contains thousands of "legitimate" titles. For that reason and because he is within the bounds of this overbroad statute even as regards his adult sexually-oriented material, he has standing to claim overbreadth and to raise this constitutional defect. See, *e.g.*, *Gooding* v. *Wilson*, 405 U.S. 518, 520-521 (1972).

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Jurisdictional Statement has been mailed, postage prepaid, to Benjamin Bull, Esq., Assistant City Attorney, City Hall Building, Norfolk, Virginia, on this 27th day of April, 1979.

ROGER E. ZUCKERMAN

FILED
APRIL 20, 1979

APPENDIX

IN THE CIRCUIT COURT
OF THE CITY OF NORFOLK

No. M 401-78

H. LYNN WOMACK,
Appellant,

v.

CITY OF NORFOLK,
Appellee.

NOTICE OF APPEAL TO THE SUPREME COURT
OF THE UNITED STATES

Notice is hereby given that H. Lynn Womack, the appellant above-named, hereby appeals to the Supreme Court of the United States from the final order of the Supreme Court of the Commonwealth of Virginia, affirming the judgment of conviction, entered herein on November 14, 1978.

This appeal is taken pursuant to 28 U.S.C. § 1257(2).

Respectfully submitted,

/s/ Roger E. Zuckerman
ROGER E. ZUCKERMAN
Roger C. Spaeder
William W. Taylor, III
ZUCKERMAN, SPAEDER & TAYLOR
1800 M Street, N.W.
Suite 375 North
Washington, D.C. 20036
Telephone: 202/223-8606
Counsel for appellant

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 19th day of April, 1979, copies of this notice were mailed, postage prepaid, to Benjamin Bull, Esq., Assistant City Attorney, City Hall Building, Norfolk, Virginia. I further certify that all parties required to be served have been served.

/s/ Roger E. Zuckerman
ROGER E. ZUCKERMAN

IN THE SUPREME COURT FOR THE COMMONWEALTH OF VIRGINIA

No. 78-2969

H. LYNN WOMACK,
Appellant,
v.
CITY OF NORFOLK,
Appellee.

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that H. Lynn Womack, the appellant above-named, hereby appeals to the Supreme Court of the United States from the final order of the Supreme Court of the Commonwealth of Virginia, affirming the judgment of conviction, entered herein on November 14, 1978.

This appeal is taken pursuant to 28 U.S.C. § 1257(2).

Respectfully submitted,

/s/ Roger E. Zuckerman
ROGER E. ZUCKERMAN
Roger C. Spaeder
William W. Taylor, III
ZUCKERMAN, SPAEDER & TAYLOR
1800 M Street, N.W.
Suite 375 North
Washington, D.C. 20036
Telephone: 202/223-8606
Counsel for appellant

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 18th day of April, 1979, copies of this notice were mailed, postage prepaid, to Benjamin Bull, Esq., Assistant City Attorney, City Hall Building, Norfolk, Virginia. I further certify that all parties required to be served have been served.

/s/ Roger E. Zuckerman
ROGER E. ZUCKERMAN

VIRGINIA:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Tuesday the 14th day of November, 1978.

Record No. 780969

Circuit Court No. M401-78

H. LYNN WOMACK,
Appellant,

against

CITY OF NORFOLK,
Appellee.

From the Circuit Court of the City of Norfolk

Finding no reversible error in the judgment complained of, the court refuses the petition for appeal filed in the above-styled case.

A Copy,

Teste:

Allen L. Lucy, Clerk

By: Richard R. [Illegible]
Deputy Clerk